THANA CONK

IBLA 88-431 Decided May 9, 1990

Appeal from decisions of the District Manager, Ukiah District Office, Bureau of Land Management, repossessing a wild horse and cancelling a Private Maintenance and Care Agreement for it, and retaining a foal born to the horse after it was repossessed. Wild Horse 82202779-221000011.

Decisions repossessing wild horse affirmed as modified; case remanded with instructions to cancel Private Maintenance and Care Agreement; decision retaining foal affirmed.

1. Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Notice of Appeal--Wild Free-Roaming Horses and Burros Act

   A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

2. Administrative Procedure: Administrative Review--Appeals: Generally--Bureau of Land Management--Rules of Practice: Appeals: Effect of

   In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's casefile) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

3. Evidence: Sufficiency--Wild Free-Roaming Horses and Burros Act

   A Private Maintenance and Care Agreement for a wild horse is properly cancelled and the horse is properly repossessed by the Federal Government where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement by "inhumanely treating" the horse, in that it was allowed to suffer stress and injury owing to action or failure to act that was not compatible with animal husbandry practices accepted in the veterinary community.

4. Evidence: Sufficiency--Wild Free-Roaming Horses and Burros Act

Where the record establishes that a wild free-roaming horse that has been placed for adoption was found in a deteriorated condition, the burden of proving that the horse was in satisfactory condition rests with the adopter. This burden is not met by uncorroborated assertions and statements of neighbors as to the general well-being of the horse.

5. Wild Free-Roaming Horses and Burros Act

Under 43 CFR 4760.1(d), BLM may, in its discretion, give a would-be adopter of a wild horse a reasonable amount of time to complete required corrective actions in lieu of immediate repossession of the horse and cancellation of the Private Maintenance and Care Agreement, or may elect to repossess the horse immediately. Where the record establishes that the horse was suffering from inhumane treatment on the date of repossession, it was properly repossessed and the agreement is properly cancelled.

6. Wild Free-Roaming Horses and Burros Act

Under paragraph 9 of BLM's Private Maintenance and Care Agreement for the adoption of wild horses, made generally applicable by 43 CFR 4760.1(a), any foal born after the adoption of a wild horse is the property of the adopter. However, the adoption of a wild horse is not final until certificate of title is issued, so that any foal born to a horse prior to issuance of certificate of title for that horse is not the property of the adopter and, where the horse has been subjected to inhumane treatment, possession of the foal is properly taken by BLM.

7. Wild Free-Roaming Horses and Burros Act

Authority for fining criminal violators of the regulations governing adoption of wild horses is distinct from the administrative remedies found therein. The fact that BLM did not present evidence at a criminal proceeding does not affect the validity of its evidence in the administrative proceeding, and the acquittal of a person on the criminal charge does not preclude the Department from invoking administrative remedies, including repossession of the horse and cancellation of the Private Maintenance and Care Agreement.

APPEARANCES: Lawrence O. Eitzen, Esq., Eureka, California, for appellant Thana Conk, who also appears on her own behalf.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Thana Conk (appellant) has appealed from decisions of the Ukiah District Office, Bureau of Land Management (BLM), repossessing a wild horse, and cancelling her Private Maintenance and Care Agreement (PMACA) with BLM for this horse. The wild horse is a palomino mare (a filly when adopted) identified by BLM as No. 82202779 (freeze mark number) and No. 221000011 (signalment key). Appellant has also appealed from an April 7, 1987, decision informing her that a foal born to this horse after it was repossessed was being retained in BLM's custody.

By application dated and evidently filed on October 24, 1983, appellant sought to adopt a wild horse pursuant to the Wild Free-Roaming Horses and Burros Act of 1971, as amended, 16 U.S.C. § 1333(b)(2)(B) (1982). On the same date BLM approved her application and entered into the PMACA with appellant for the private maintenance, protection, and welfare of the horse described above.

The chronology of events leading to BLM's repossession of the horse and cancellation of the PMACA is set forth in BLM's March 1988 decision:

> A complaint was rendered by Rebecca Kimbel concerning a BLM wild horse on June 11, 1985. Her concern was that the animal was not being properly cared for. On June 12, 1985, Ms. Kimbel directed BLM biological technician, Pamala Perrone, to the location of the animal. [1/]
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> Operating under authority given in 43 CFR 4760.1(c), Ms. Perrone inspected the animal and facilities from the adjacent county road. She observed the animal to be underweight (possibly suffering from a parasitic worm infestation), have long hooves and no water. The pasture had a great deal of hazardous debris, as well as, poor fencing, including some barbed wire, which is prohibited. A shelter or barn, as described in the adopter's Application for Adoption, was not found. [2/] Ms. Conk was reported to

1/ A memorandum in the casefile describing Kimbel's "complaint" indicates that she also reported that there had never been any shelter or corral on appellant's property, and that the fencing was not safe, being only around four feet high, with barbed wire as the top strand. It was also alleged that appellant was not properly feeding the horse.

2/ In responding to Question 11 on the application form, she described the facilities where the animal would be maintained as follows: (a) -- corral size, fencing materials, and height: "1 acre -- 6 feet -- pole and hog wire"; (b) -- pasture size, fencing materials, and height: "13 acres -- 6 feet -- pole and hog wire (some hot wire)"; (c) -- shelter, barn, or stall dimensions: "12 x 12."

be in violation of Term 1 of the PMACA and to be in violation of 43 CFR 4760.1(a), 4770.1(f) and 4770.1(g). [3/]

BLM attempted to contact Ms. Conk[;] she was, however, no longer living at the address given on her PMACA and the telephone number given was no longer operational. Thus, the adopter was in violation of Term 7d and 43 CFR 4750.4-1(g). In June of 1985, Ms. Conk was eventually contacted at her place of work by Ms. Perrone; changes were requested in the care of the animal and the facilities. [4/] Ms. Conk responded by declaring that no changes were necessary and that she would have someone other than BLM certify that the animal had been properly cared for in order to receive Certificate of Title. An Application for Title was never filed.

A compliance inspection was conducted on July 24, 1986 by BLM personnel Bruce Dawson and Pamala Perrone in which Ms. Conk participated. No changes in pasture, fence, or shelter conditions were observed. The BLM animal was still in less than satisfactory condition. [5/] Thus, Ms. Conk remained in violation of 43 CFR 4760.1(a), 4770.1(f) and 4770.1(g) and Term 1 of the PMACA.

A certified letter (pursuant to 43 CFR 4760.1(d)) was sent to Ms. Conk [at her new address] on August 15, 1986 outlining the following changes:

1) Clean all debris from pasture and isolate the mustang from all other animals;

2) Repair fencing so as not to endanger animal;

3/ The record contains a memorandum to the file describing the site visit which contains further details, including a report by two runners who, as
casual observers, stated that they saw someone feeding the animals "maybe once or twice a week" and that "the animals are always hungry and you know it because they are always breaking out to graze."

4/ On her application, appellant had listed her address as 1719 Harris Street, Eureka, California 95501. BLM evidently learned appellant's new address (1564 Charles Avenue, Arcata, California 95521), because subsequent communications were sent there.

5/ The case record contains memorandums to the file by BLM employees concerning the compliance visit noting that the horse was "suspected of being wormy and being underfed." One memorandum indicates that the pasture on which the horse was grazing lacked a source of water and had experienced exceedingly heavy use, with the result that there was no forage available for the horse, which was sharing the pasture with approximately seven head of cattle and two other horses. It states that the pasture contained hazardous debris on the ground, including barbed wire, broken glass, lumber with exposed nails, and rusted metal.

3) Take a fecal sample to local [veterinarian] and have worm analysis done. Treat according to [veterinarian's] instructions;

4) Provide clean fresh water daily;

5) Feed on a regular basis. Twice daily recommended.

Thirty (30) days were given to make changes. The certified letter was never claimed.

On March 9, 1987, Pamala Perrone again noted the animal to be in poor condition. [6/] The animal was observed from the county road. A certified letter was sent on March 13, 1987 to Thana Conk requesting the changes required in the letter of August 15, 1986. The letter also stated that failure to take action would result in [repossession] of the animal (pursuant to Term 5 (2) of the PMACA and 43 CFR 4770.2(b)). As of March 23, 1987, the letter was not claimed. [7/]

On March 24, 1987 BLM requested assistance from the Humane Society (pursuant to 43 CFR 4760.1(a)) for an independent assessment of the animal's health and condition. State Humane Officer Dan Leavitt concurred with BLM's assessment. Possession of the animal was assumed by Humane Officer Leavitt under the authority of California Statutes applying to humane treatment of animals.

Present were Deputy Lee Goehri (Humboldt County Sheriff), Humane Officer Dan Leavitt (Humane Society), Ranger Paul Tyner (BLM), Wildlife Biologist Paul Yull (BLM), Range Conservationist Bruce Dawson (BLM), and Range Technician Pamala Perrone (BLM). The group present was unanimous in [its] opinion that the BLM mare was underweight and that she had been neglected.

6/ A memorandum in the record describes the Mar. 9, 1987, site visit as follows:

"On March 9, 1987 I * * * did a field compliance inspection on Thana Conk's mustang mare * * *. Again I couldn't go into the pasture, but I did walk the property line and I used a pair of binoculars. There was no evidence of any change[:] [a]ll the fencing, the gate, the lack of shelter, no corral, no water, no signs of food, the [mare's] hooves were still long, debris all over, nothing had been done, and one more addition to the mess, a dead sheep. The mare was still thin and (from a distance) looked in worse shape than ever."

7/ The letter was claimed by appellant on Mar. 31, 1987, after the horse was repossessed.

The animal was turned over to BLM for [veterinarian] investigation and care. BLM personnel transported the animal back to Ukiah.

(BLM Decision at 2-3). This recitation of facts is supported by documen-tation in BLM's case record.

A Conversation Record signed by a BLM employee in the casefile shows that at about 8:30 a.m. on March 25, 1987, the day after the horse was repossessed, appellant telephoned BLM to discuss the details of the com-plaint against her and the specifics of the repossession. She asserted that the horse was in fine condition and informed BLM that as a result of its action, five cows got out on the road. She also threatened a law suit if the mare or foal she was carrying died. William Smith, appellant's friend, also called BLM at 8:45 a.m. and explained how much the animal was fed and how the debris had been cleared from the pasture. Smith inquired as to whether their own veterinarian could examine the horse and requested that he be allowed to adopt it.

BLM called appellant at 10 a.m. on March 25, 1987, to give her "all the details" and informed her that a local veterinarian would look at the animal as an impartial observer and determine its health on March 26, 1987. It is not clear whether appellant specifically agreed to the examination of the horse by this veterinarian, but it appears that she did not, as she would later repeat her request to have her own veterinarian examine the horse.

On March 26, 1987, Mort Cohen, DVM, examined the horse in Ukiah at BLM's request. His findings, as stated in writing and by telephone to BLM, were as follows:

1) The horse, which was pregnant, was 100 pounds underweight;

2) Her feet were neglected: marked thrush was present and hooves needed clipping (3 inches too long);

3) Her hair coat was dry and scaly;

4) Her muscle quality was poor;

5) Fecal analysis indicated a count 200 blood worms per unit (described as an "extremely heavy" infestation); some round worms were found as well.

He stated in writing that the results of the fecal analysis indicated "poor animal husbandry." His verbal conclusion was to the point: "animal neglected."

On March 27, 1987, BLM sent appellant information regarding her right to appeal to the Interior Board of Land Appeals. The cover letter stated, in toto, "Please find enclosed information on the Department of Interior

appeals process. Should you have any questions regarding appeals or the repossession of Bureau of Land Management Wild Horse 82202779-221000011, [the BLM employee] can be contacted at [the Ukiah, California, offices of BLM]." Thus, although the letter alluded briefly to the repossession of the horse, it did not set out the factual details or legal basis supporting BLM's decision to repossess. No mention was made of the status of the PMACA.

On March 30, 1987, BLM sent appellant a copy of Dr. Cohen's report. In an accompanying letter, BLM explained that it could not honor the request of William Smith to obtain a separate fecal sample for independent analysis because the seriousness of the parasite problem necessitated immediate implementation of a worming program. BLM explained that the mare was treated with Strongid Paste (Pyrantel pamoate) on March 29, 1987, as soon as she was beyond the danger of colic. BLM evidently did not directly respond to the more general request that a veterinarian chosen by appellant be allowed to examine the animal.

In a letter dated April 7, 1987, BLM notified appellant that a foal had been born to the repossessed horse on April 5, 1987. BLM expressed its opinion that it was in the best interest of the foal that the foal stay in BLM custody and be adopted out with its mother. BLM also advised appellant that she had the right to appeal from this determination. However, the record does not contain anything showing when appellant received this letter.

On April 10, 1987, appellant was issued a Federal citation for the "Inhumane Treatment of a Wild Horse or Burro" citing 43 CFR 4770.1(f). By letter dated April 10, 1987, BLM stated that the collateral bond for the violation was $50. BLM explained that appellant could either pay the bond or request a trial before a magistrate.

On April 15, 1987, within 30 days of both the repossession of the horse and appellant's receipt of the March 27 "appeal rights" letter, appellant, through counsel, filed a letter with BLM "protesting the unlawful seizure" of her horse and requesting "an appellate hearing under the terms of Title 43 CFR § 7440.3 [sic]." Appellant requested the return of the horse. No mention was made of the foal in this document.

The April 15 letter contained a statement of reasons, in which appellant disputed BLM's evident conclusion that the horse was inhumanely treated, referring to photocopies of photographs taken when the horse was first adopted and more recent photographs to support her contention that the horse was maintained in good condition. Appellant asserted that the horse received regular clean, fresh water and food sufficient to maintain its weight. Appellant also disputed BLM's evident conclusion that its order to comply (requiring improvement of the conditions in which the horse was kept) had been violated, asserting that at the time the horse was seized by BLM, it was being kept in an isolated pen which was free of debris and well secured.

Appellant contested the validity of BLM's veterinarian report and repeated her request to have her veterinarian examine the horse. She stated that the horse could not be wormed with an appropriate medication because it was 10 months pregnant at the time of the seizure. Appellant added that none of her other animals suffer from an unacceptable level of strongylus vulgaris. Appellant added that she had a veterinarian's report establishing that the horse was maintained in good condition, but no such report was submitted.

Referring to 43 CFR 4760.1(d), which requires BLM to give an adopter a reasonable amount of time to take corrective action, appellant stated that she did not receive BLM's notice of August 15, 1986, requiring her to make certain changes in the care of the horse, because the post office failed to provide her with notice that it had the letter. Appellant noted that BLM's second letter requiring changes in the care of the horse, dated March 13, 1987, was not received until 3 days after the horse was seized.

Finally, appellant asserted that BLM had committed trespass on private property without authorization, explaining that the gate to the property was left open, thereby allowing livestock to wander down a frequently traveled road.

As discussed below, this document was plainly a notice of appeal of BLM's action to repossess the horse. Further, although the letter does speak of "protesting" the seizure of the horse, rather than "appealing" this action, any lack of clarity was dispelled by the fact that the document expressly requested "an appellate hearing" and cited (albeit imperfectly) to the provision allowing appeals to this Board. 8/ BLM failed to take any action to forward this appeal to this Board. 9/

8/ Appellant's document miscited the governing regulation, citing 43 CFR "7440.3" (which does not exist), instead of 43 CFR 4770.3, the section governing administrative appeals. BLM should not have been misled by this technical error.

Also, 43 CFR 4770.3 itself contains a technical error, in that it refers to "43 CFR 4.4" (an irrelevant provision dealing with the availability of public records of the Office of Hearings and Appeals and the location of its offices) instead of "43 CFR Part 4" (containing all appeals regulations) or "43 CFR 4.410" (specifically governing appeals to the Board of Land Appeals from decisions by officers of the BLM).

9/ To compound the matter, BLM ignored for some weeks a June 23, 1987, follow-up letter from appellant's counsel inquiring into the status of the matter. The case record shows that BLM attempted to contact appellant's counsel on Aug. 7, 1987, more than a month after the June 23, 1987, follow-up letter was received, "to seek clarity as [to] whether or not he had actually appealed to IBLA." A second call was made by BLM on Sept. 14, 1987. Appellant's counsel evidently did not return these calls.

However, there is no adequate explanation as to why BLM waited until August to deal with the follow-up letter. In any event, as discussed below, we do not accept that BLM could have maintained any reasonable uncertainty that an appeal had, in fact, been filed.

On January 7, 1988, almost 9 months after it was filed, BLM informed appellant that it had "interpreted [her letter filed on April 15, 1987,] as an official appeal and a part of the appeals process pursuant to 43 CFR 4.411 in which [she] exercised her right to an administrative remedy." BLM reiterated that inspection of the horse would be meaningless in that a worming program had begun on March 29, 1987, and a feeding program had begun on March 25, 1987. Therefore, BLM concluded that an effective comparison was impossible.

In this letter, BLM justified its failure to respond to concerns raised by appellant by emphasizing that her letter filed on April 15, 1987, "set the appeals process in motion," and that "the most prudent course of action for all concerned [would be] to let the administrative appeals process run its due course." However, despite its evident recognition that an appeal had been filed, BLM still took no action to forward the case to this Board. 10/ As discussed below, BLM's continuing failure to do so was error.

Furthermore, even though it was aware that an appeal was pending, BLM continued to review the case and, by decision dated March 31, 1988, cancelled appellant's PMACA. As a basis for the cancellation, BLM stated that it found appellant to be in violation of Term 1 of the PMACA, providing proper care and protection of the animal under humane conditions (43 CFR 4750.4-1(e), 4770.1(f), and 4760.1(a)). BLM stated that appellant was given nearly 2 years to remedy the situation but failed to do so. BLM's determination was based upon BLM field inspections of the animal and facilities on June 12, 1985, July 24, 1986, and March 9 and 24, 1987. BLM also found appellant to be in violation of Term 7d of the PMACA, which provides for notification of address change within 30 days. 43 CFR 4750.4-1(g) and 4750.4-1(b). In addition, BLM determined that appellant made a false statement on her application concerning her facilities. BLM found that no shelter, barn, or stall (as described by appellant in her application) was observed by BLM during its inspections.

Appellant, this time acting on her own behalf, filed a timely notice of appeal from the March 31, 1988, decision cancelling the PMACA. BLM processed this notice of appeal, forwarding the casefile to us on May 11, 1988.

We first address BLM's handling of the repossession of the horse. As it sent appellant information on how to appeal shortly after the repossession, BLM evidently believed that the repossession of the horse was the decision point at which the right of appeal to this Board arose. In other

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10/ Counsel for appellant made a game effort to break this deadlock with a letter dated Jan. 12, 1988, in which he called into question the fact that his client's appeal was not progressing. BLM evidently ignored this letter.

cases, BLM has regarded its decision cancelling the PMACA following repossession as the appealable decision. In those cases, the cancellation deci-sion was issued either at the same time as or shortly after the repossession
of the horse. 11/ This procedure generally comports with that presently specified in the BLM Manual:

> Repossession. If the adopter does not take corrective action within the specified time, the Authorized Officer shall repossess
> the adopted animal by issuing a full force and effect decision cancelling the [PMACA]. Depending on the animal's condition, the Authorized Officer may repossess the animal without first giving the adopter the opportunity to take corrective action. In either case, the adopter must be informed of the right to appeal the decision. (See 43 CFR 4.4 [sic] for appeal procedures).

BLM Manual 4760.2.22 (Release 4-95, Nov. 23, 1988). 12/ Under this procedure, BLM must issue a written decision that clarifies the legal basis for the repossession, to-wit, the cancellation of the PMACA.

However, BLM did not follow this procedure here, but instead advised appellant that she could file an appeal on March 27, 1987, shortly after repossession but before a decision cancelling the PMACA (or any other formal written decision) had been issued. Since BLM elected to invite an

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11/ Cf. Grant F. Morey, 108 IBLA 354 (1989), and Susan A. Moll, 101 IBLA 45 (1988) (where BLM served a copy of this decision on the would-be adopter at the time it repossessed the horse); Esther E. Lenox, 102 IBLA 224 (1988) (where the horse had previously been seized by county officials, but where
BLM issued a joint decision simultaneously notifying the would-be adopter that it was taking possession and cancelling the PMACA when it took possession of the horse from the county); and Mary Magera, 101 IBLA 116 (1988) (where BLM issued a formal, written decision on Jan. 15, 1987, cancelling the PMACA for a horse that had been repossessed on Dec. 29, 1986).

12/ As we observed in Mary Magera, 101 IBLA at 116-17 n.1, decisions con-cerning wild horses are not presently exempt from the provisions of 43 CFR 4.21(a), which provides that a decision under appeal shall not be in effect either during the 30-day time period for appealing or, if a timely appeal is filed, during the pendency of the consideration of the appeal by the Board, unless the Board provides otherwise. Insofar as it states that BLM is to
issue a "full force and effect decision," the BLM Manual is not in accord with 43 CFR 4.21(a).

However, there are recognized exceptions to this rule under which BLM's decision remains in effect unless the Board rules that it is sus-pended. It appears to us that a decision by BLM cancelling a PMACA for alleged cruelty or neglect is the type of decision that might reasonably remain in effect unless the would-be adopter can convince the Board that it should be released. Such procedure would have the salutary benefit of bringing the validity of the seizure of an animal to the Board's attention promptly. Such procedure could be implemented by amendment of the present regulations.

appeal from the repossession, and since an appeal was filed, BLM was bound to honor the appeal by forwarding it to this Board. Under 43 CFR 4.411, a party wishing to appeal a decision of BLM is required to file a notice of appeal in the office of the officer who made the decision, not with the Board. This procedure was adopted because BLM would be expected to know of the decision that is appealed, having just issued it, while the Board would have no knowledge of the matter. Thus, it only makes sense to have the notice of appeal filed with BLM.

[1] The April 6, 1987, letter from appellant's counsel was adequately clear to put BLM on notice that she wished to appeal BLM's repossession of
the horse. A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges a decision that has been made by BLM (as opposed to challenging action that is proposed to be taken). Arnell Oil Co., 95 IBLA 311, 317 (1987). BLM recognized in its January 7, 1988, letter to appellant's counsel that the April 6, 1987, letter was a notice of appeal.

[2] The filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, and BLM's authority is not restored until the Board takes action disposing of the appeal. AA Minerals Corp., 27 IBLA 1 (1976). In keeping with this principle, BLM must forward the case (as represented by BLM's casefile) to the Board so that it may exercise its authority to resolve the dispute.

Under governing procedures, an appellant is not required to serve a copy of his notice of appeal on the Board, which normally becomes aware that a notice of appeal has been filed only when BLM forwards the notice of appeal and its complete, original casefile in the matter to the Board. BLM must forward the record to the Board within no more than 10 business days after receipt of the notice of appeal. Utah Chapter Sierra Club, 114 IBLA 172, 175 (1990) (citing with approval BLM Manual 1841.15 A). Until the file is received, the Board is unable to intelligently review the details of the dispute, and may not even be aware (as in this case) that a notice of appeal has been filed. 13/

The Board is very sensitive to delays in forwarding the case when a notice of appeal is filed, as BLM's failure to promptly transmit a file might be seen as recalcitrance, resulting in delaying an appellant's right to have BLM's decision reviewed by the Board. See Harriett B. Ravenscroft, 105 IBLA 324, 331 (Hughes, A.J., concurring). We are surprised by BLM's failure to initially realize (or to become aware during the more than 13 months that it held the case following the filing of the notice of appeal) that it was required to forward the case to the Board, so that

13/ An appellant may serve a courtesy copy of his notice of appeal on the Board, but he is not required by regulation to do so. Where the Board becomes aware of an appeal in this manner, it does not hesitate to contact BLM if no casefile is forthcoming after a reasonable period of time.

the administrative appeals process could begin to run its course. 14/
It is hoped that BLM will take steps to conform their procedures to these realities to avoid similar mishandling of appeals in the future. 15/

We are also troubled by BLM's decision notice concerning the repossession of appellant's horse. The horse was repossessed by BLM on March 24, 1987. The record contains a "Notice of Impoundment" dated March 24, 1987, signed by a California State Humane Officer. This notice indicates only that the horse was "[i]mpounded in the care of" the Ukiah, California, office of BLM and contains the name and telephone number of a BLM employee to be contacted. There is no proof that this notice was ever served on appellant, who complains that BLM did not even leave her a note letting her know that the horse had been repossessed.

Appellant states that she found out who had taken the horse only when she called authorities to report the theft of the horse. Appellant did find out, as she was able to contact BLM at the opening of business on the day following the repossession. However, in our view, where BLM repossesses a wild horse, the would-be adopter should not be left to speculate as to who seized it or why.

We also note that BLM failed to issue a formal, written decision setting out the legal basis for the repossession. BLM did give written notice that the horse had been repossessed (the letter of March 27, 1987) and did provide notice that its veterinarian had found the horse to be in poor condition, but it did not offer any citation to its authority to seize the ani-mal or make a formal finding that the animal had been neglected. However, BLM has subsequently set out the reasons for its repossession decision formally and in writing via its decision of March 31, 1988. While a decision issued at the time of repossession might have better informed appellant of why her horse had been taken, the subsequent decision provides an adequate basis to review its actions. BLM's March 1987 decisions repossessing the horse are hereby modified to reflect the reasons set out in our decision, below.

[4] Turning to the merits of the appeal, the Wild Free-Roaming Horses and Burros Act of 1971, as amended, 16 U.S.C. § 1333(b)(2)(B)

14/ If it did not at first realize that the Board could not consider the appeal because it did not have the case record before it, BLM should surely have become aware that there was some problem from appellant's counsel's persistent inquiries, which showed that the appeal was not, in fact, being processed. We are not unmindful that there were grounds for BLM to be uncertain how to handle the appeal: the notice of appeal was styled as a "protest" and miscited the applicable regulation, which, in turn, contained an error. Nevertheless, BLM could easily have secured information on how to deal with these problems from either the Regional Solicitor, the California State Office, BLM, or from the Board itself.
15/ We note that the Phoenix Training Center, BLM, has available decentralized training packages that address the details of the administrative review process and BLM's obligations when an appeal is filed.

(1982), authorizes the Secretary of the Interior to place wild horses with qualified applicants who can assure humane treatment and care. See 43 CFR 4750.3-2(a). Title to horses placed in private care remains with the Government for a minimum of 1 year after placement and execution of the PMACA and until BLM issues a certificate of title. 16 U.S.C. § 1333(c) (1982); 43 CFR 4750.4(a). Here, title to the horse remained in the United States because no certificate was ever issued. 43 CFR 4750.5. Since title remained in the United States, BLM remained free to repossess the horse if circumstances warranted. 43 CFR 4750.5. 16/

Under 43 CFR 4750.4-1(e), adopters are responsible for the proper care and treatment of wild horses covered by the PMACA, and 43 CFR 4760.1(a) expressly requires the adopter to comply with the PMACA and the regulations. Section 1 of the PMACA and 43 CFR 4770.1(f) both specifically prohibit treating a wild horse or burro inhumanely. As discussed below, the record in this case supports a finding that the wild horse assigned to appellant had been "inhumanely treated" at the time of repossession, as that term is defined by 43 CFR 4700.0-5(f), in that it was allowed to suffer stress and injury owing to action or failure to act that was not compatible with animal husbandry practices accepted in the veterinary community. 17/ Failure to comply with the terms of the agreement may result in its cancellation, repossession of the horse subject to it, and disapproval of subsequent requests to adopt additional wild horses or burros. 43 CFR 4770.2(b). Thus, appellant's inhumane treatment alone reasonably justifies repossession of the horse and cancellation of the PMACA. Esther E. Lenox, 102 IBLA at 228; Mary Magera, 101 IBLA at 119.

Specifically, the record contains the field compliance inspection reports filed by BLM employees. These reports are very strong evidence of an historical pattern of neglect over several years leading to serious physical deterioration of the horse. Further, BLM documented the condition of the horse and appellant's facilities in a series of photographs taken by BLM from October 24, 1983, the date on which the horse was adopted through March 25, 1987, the date on which the horse was repossessed. Several photographs show that the mare is not able to stand square (with front hooves in the same position at the same time) due to stress, caused by exceedingly long hooves. Other photographs show the deterioration of the inner part of the hooves, found by the veterinarian to be caused by a disease known as thrush (a bacterial infection) and excessive hoof length. Other photographs clearly show that, at the time of repossession, the horse lacked weight in her shoulders and hips.

16/ Appellant asserts that she did apply for title, but that it was never issued. The record contains nothing indicating that such request was made.
However, the only relevant fact is that title was not issued to appellant, which is not in dispute.

17/ This is not to imply that appellant was deliberately cruel to the horse. Inhumane treatment may be just as much the result of neglect as design. Esther E. Lenox, 102 IBLA at 228 n.6; Kathryn E. Spring, 82 IBLA 26, 30 (1984).

Significantly, BLM's conclusion that the horse had deteriorated seriously was shared by independent observers from the County government and State humane society. Lee Goehri, Humboldt County Sheriff, and Dan Leavitt of the Humane Society agreed with BLM that the horse was underweight and had been neglected, and that impoundment was called for. In deciding to cancel an agreement and repossess a horse, the Board may rely on an observed "deteriorating condition of the animals, themselves and * * * the credible reports of third parties." Grant F. Morey, 108 IBLA at 356; Mary Magera, 101 IBLA at 119; Dennis Turnipseed, 66 IBLA 63, 67 (1982).

BLM's photographs also confirm contemporary eye-witness reports concerning the unhealthy and hazardous condition of appellant's facilities. BLM points out that several photographs taken on October 29, 1983, show that the facilities where the animal was kept were different from those described in her application for adoption, in that there is no enclosure for the animal. Other photographs taken on May 1, 1984, and June 12, 1985, show the muddy conditions of the pasture and absence of any grazing fodder, which are conducive, respectively, to worm infestation and weight loss. Also evident is the poor condition of appellant's facilities, with poor fencing and debris littering the pasture.

Finally, the veterinarian report prepared by Mort Cohen, DVM, and his conclusion that the horse had been neglected as a result of poor animal husbandry is strong evidence that the horse had been inhumanely treated.

[5] Turning to the decision to cancel the PMACA, we note that, as discussed above, BLM's March 31, 1988, decision cancelling the PMACA was a nullity. Thus, technically, no decision on this question has yet been made. Accordingly, we shall exercise our de novo review authority to review the merits of the cancellation of the PMACA.

When BLM cancels a PMACA, the adopter has the burden of establishing that such action was improper. Esther E. Lenox, 102 IBLA at 227 n.4; Mary Magera, 101 IBLA at 119. In order to prevail in this appeal, appellant must establish that the cause of the animal's decline was not attributable to any conduct on her part or any failure by her to take necessary care of the horse. Mary Magera, 101 IBLA at 119. Appellant's assertions that the horse was well maintained and in a healthy condition, together with the photographs of the horse and the statements of neighbors, are insufficient to overcome the evidence of substandard care and health problems submitted by BLM. The fact that appellant indicated that she had available a veterinarian's report adds nothing to appellant's case, since none was submitted.

We are troubled by BLM's denial of appellant's March 25, 1987, request that she be allowed to have the horse examined by a veterinarian of her own choice. By decision dated March 29, 1987, BLM denied appellant's request on the grounds that the horse had already been treated for parasites, so that test results would no longer accurately indicate the animal's condition. However, this ignores that appellant's veterinarian could have confirmed or disputed other relevant medical conditions, including the horse's weight and the condition of its feet. However, although he may not have been selected

by appellant, we may rely on Dr. Cohen's report, as there is nothing in the record suggesting that he was not an impartial judge of the horse's condition, and because his findings are corroborated by independent test results and observations by Government officers.

Appellant alleges that County livestock officer Goehri stated that he did not "voice an opinion" and that he cut the chain on appellant's gate because "he was ordered to cut it by the BLM." She also alleges that other
County and State humane society officers found no problem with her treat-ment of the animal. In the absence of corroborating evidence, such as affidavits, we are unable to credit these reports.

In these circumstances, we deem it appropriate to cancel the PMACA. As noted above, it will be necessary on remand for BLM to issue a decision cancelling the PMACA, as its March 31, 1988, decision purporting to do so was technically void. BLM is hereby directed to do so. Since we have determined in this opinion, on behalf of the Secretary, that the PMACA should be cancelled, there will be no further right to appeal BLM's decision implementing this directive. Phelps Dodge Corp., 72 IBLA 226 (1983).

[6] Appellant asserts that she did not receive notice of BLM's letter of August 15, 1986, requiring her to make certain changes in the care of the horse, and that BLM was therefore barred from repossessing the horse by 43 CFR 4760.1(d), which provides that the adopter may be given a reasonable amount of time to complete required corrective actions in lieu of immediate repossession of the horse and cancellation of the PMACA. We have held that it is within BLM's discretion whether to repossess the horse immediately or to allow additional time to respond. Esther E. Lenox, 102 IBLA at 228 n.7. Thus, in view of the objectively established ill condition of the horse on the date of repossession, it was properly repossessed and the PMACA is prop-erly cancelled under the regulations, even if the two letters requiring corrective action had never been sent.

BLM asserted that appellant had failed to inform it of a change of her address, holding that her failure to do so violated the terms of the PMACA. Appellant strenuously denies this allegation, asserting that she notified the Arcata, California, BLM office of her change of address. Additionally, BLM relied on alleged misrepresentations in appellant's application for adoption concerning the facilities to be provided for the horse, as well as appellant's admitted use of barbed wire to enclose the horse. Appellant generally admits these allegations. 18/ It is, however, unnecessary to

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18/ Concerning the 12 by 12-foot shelter mentioned on her application, appellant states that in the winter of 1984 a severe storm twisted the shelter and it was subsequently removed. No explanation is provided as to why it was not replaced.

As for the fencing, appellant claims that someone kept "shorting out" her hot wire by the road so she replaced it with hog wire. When the hog wire was stolen, appellant admits that she replaced it with barbed wire.

consider these issues, as the record reveals adequate grounds (set out above) for the repossession of the horse and cancellation of the PMACA even disregarding appellant's alleged failures.

[7] There remains the question of the status of the foal born to this horse on April 5, 1987, after it was repossessed. By decision dated April 7, 1987, BLM gave notice to appellant that the foal would stay in
BLM's custody and be "adopted out" with its mother. However, there is no indication in the record as to when appellant received this decision, as it does not appear to have been sent to her by certified mail. Appellant did specifically object to BLM's decision to retain the foal in her notice of appeal filed April 29, 1988, more than a year after the date of the decision. However, in the absence of proof establishing when appellant received the April 7, 1987, decision, we are unable to dismiss this appeal as untimely. Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (1986).

We note that, unlike the March 31, 1988, decision concerning the PMACA of the wild horse (which was issued at a time when BLM lacked authority over the dispute, since a notice of appeal had been filed from the repossession), BLM's decision concerning the foal was properly issued. The question of the status of the foal, though related to the horse's status, was sufficiently distinct to justify BLM's taking action, even though the status of the horse was under appeal.

The regulations are silent on the question of the status of the foal. Paragraph 9 of the PMACA provides that "[a]ny foals born after the adoption of the above animals are the property of the adopter." The terms of the PMACA are generally made applicable under the terms of 43 CFR 4760.1(a). The adoption of a wild horse is not final until certificate of title is issued. See 16 U.S.C. § 1333(c) (1982); 43 CFR 4750.5(c). Accordingly, we interpret Paragraph 9 to mean that any foal born to a horse prior to the issuance of the certificate of title is not the property of the adopter.

The foal here was the property of the United States and remained subject to repossession by the Government, as did its mother. See 43 CFR 4770.2(c). As the record demonstrated that appellant had subjected the mother to inhumane treatment, BLM properly determined to retain possession of the foal. Further, BLM could properly determine that the foal would not be "adopted out" to appellant, as denial of any request by appellant to adopt additional horses was authorized by the regulations in these circumstances. 43 CFR 4770.2(c).

[8] Appellant states that on January 12, 1988, a Federal magistrate found her "not guilty of inhumane treatment of a wild horse" and stated that BLM "did not have probable cause for what they did." The details of

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fn. 18 (continued)
Appellant states that she did not know that barbed wire was forbidden. In fact, 43 CFR 4750.3-2 specifically states that fence materials shall not include barbed wire.

this criminal proceeding are not clear, but it appears from appellant's statements that no one from BLM appeared at the criminal trial on behalf of the Government except the employee who signed the violation notice.

Authority for fining violators of these regulations and trying them before a Federal magistrate is found in 43 CFR 4770.5. This regulation deals with criminal penalties and is distinct from the administrative remedies found in 43 CFR 4770.3. The fact that BLM may not have presented evidence at the trial before the magistrate in this criminal proceeding is no indication that the evidence in the administrative proceeding is insuf-ficient to prove that the regulations were violated and that BLM's seizure of the horse was proper. Further, appellant's acquittal, even if on the merits of the criminal charge, does not bar the imposition of civil remedies, in view of the more stringent standard of proof applicable in criminal proceedings. See One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235 (1972).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Ukiah District Office retaining custody of the foal is affirmed, its deci-sion repossessing the horse is affirmed as modified, and the case is remanded with instructions to issue a decision cancelling appellant's PMACA.

David L. Hughes
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge